



**MTN'S RESPONSE TO THE NOTICE OF ICASA'S INTENTION TO PRESCRIBE
REGULATIONS IN RELATION TO BITSTREAM AND SHARED/FULL LOOP ACCESS
REGULATIONS AS PUBLISHED IN GOVERNMENT GAZETTE NO 36840 DATED 11
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1. INTRODUCTION

MTN (Pty) Limited ('MTN') would like to thank the Independent Communications Authority of South Africa ('ICASA') for the opportunity to respond to the draft Bitstream and Shared/Full Loop Access Regulation published in Government Gazette No. 36840 ('Bitstream Access Regulation').

ICASA's view is that access to the local loop is mandated in terms of the obligation to lease facilities [Section 43(1)] of the Electronic Communications Act, No 36 of 2005 ('the ECA') and any facilities leasing agreement is governed by the Facilities Leasing Regulation in Government Gazette No. 33252 of 31st May 2010. This view is not supported by MTN for the reasons set out hereunder.

Moreover, the scope of the Regulation is now so broad and indiscriminate in its application in that it includes all ECNS licensees and does not focus on the local loop infrastructure offered by ECNS licensees with significant market power ("SMP"). It seems as if ICASA has abandoned an approach of a best practice and focused local loop unbundling process for one that is indiscriminate and a "one size fits all".

More significantly the draft Regulation also seems to include wireless access within the ambit of local loop which is not legally sound nor based on international best practice. MTN understands the true purpose, although this is not clear from a reading of the Regulation that the Bitstream Access Regulation is to facilitate the unbundling of the "fixed line local loop". This, together with the options for access to the local loop, namely, bit stream access, shared loop unbundling and full-loop unbundling highlight the fact that the focus is solely to regulate the unbundling of the wire line ("fixed") local loop and as such the Regulation should focus on the fixed – copper local loop and not make reference to wireless concepts such as "radio network interface" and "radio frequency".

ICASA had advised the industry that an "explanatory note" dealing with ICASA's decisions with respect to the structure of the draft Regulation would be published together with the amended draft Regulation (Notice 940 – GG 36840 of 11 September 2013). As this has not

transpired, MTN is unable to properly engage on the rationale for the proposed unbundling process.

2. LEGAL ARGUMENTS

2.1 The inclusion of mobile into the ambit of Bitstream and Shared/Full loop access

The specific question MTN asks is whether ICASA is legally entitled to include mobile or wireless loop unbundling in the current local loop unbundling process. We conclude that it is not and we set out our reasons for that conclusion below.

2.1.1 The Bitstream Access Regulation concerns itself with the leasing of facilities as per Section 43(1) of the Electronic Communications Act 36 of 2005 (“the ECA”). According to ICASA, access to the local loop represents a specific form of facilities leasing.

2.1.2 “Full Local loop” is defined in the Bitstream Access regulation and “*means a situation where a facilities seeker may interconnect with the facilities of an ECNS licensee at a Hand Over Distribution Frame with the ability to offer both voice and data services*”.

“Local Loop” in turn is defined as “*all physical media, including electrical, optical and radio frequency, used as the electronic communications facilities for the connection of an end-user or end-site to an access network aggregation point on the electronic communications network*”. [our emphasis]

2.1.3 Section 43(1) of the ECA obliges electronic communications network service licensees (“ECNS licensees”), on request, to lease electronic communications facilities to any other persons licenced in terms of the ECA and exempted persons in terms of an agreement unless the request is unreasonable.

2.1.4 “electronic communications facilities” are defined in the ECA as including but not limited to:

“(a) wire;

(b) cable (including undersea and land-based fibre optic cables);

(c) antenna;

(d) mast;

(e) satellite transponder;

(f) circuit;

(g) cable landing station;

(h) international gateway;

(i) earth station;

(j) radio apparatus or other thing,

which can be used for, or in connection with, electronic communications ...”

2.1.5 In addition to the mandatory obligation on the part of ECNS licensees to lease electronic communications facilities, Section 43(8) of the ECA empowers ICASA to prescribe a list of essential facilities which are also required to be leased by ECNS licensees under subsection (1). These essential facilities include but are not limited to “electronic communications facilities, including without limitation, local loops, sub-loops and associated electronic communications facilities for accessing subscribers and provisioning services”.

2.1.6 Given that ICASA’s power to regulate local loop unbundling is derived from Section 43 of the ECA, in order to determine whether mobile or wireless loop unbundling may be included in the current local loop unbundling process, it is necessary to consider two questions.

First, whether the mobile or wireless loop or radio frequency for that matter qualifies as an electronic communications facility under Section 43(1) of the ECA because the obligation to lease facilities under Section 43(1) of the ECA is confined to electronic communications facilities; and

Secondly, assuming that the mobile or wireless loop does not qualify as an electronic communications facility, whether it could nonetheless be defined by ICASA as an essential facility in terms of Section 43(8) of the ECA.

We deal with each of these questions in the sections which follow.

An electronic communications facility?

- 2.1.7 Notwithstanding the fact that the definition of “electronic communications facilities” is expressly not limited to the list of ten items which appear in the definition, it is an accepted canon of statutory interpretation that terms with a wide meaning may be restricted by terms with a narrower meaning with which they are connected. All of the items listed in the definition of “electronic communications facilities” are physical or tangible. By contrast, the mobile or wireless loop is part of the mobile spectrum and spectrum is intangible. It does not have a physical existence which would make it part of the same “genus” or class as those facilities listed in the definition of electronic communications facilities.
- 2.1.8 As a result, in our view, mobile spectrum is not an electronic communications facility and therefore the obligation to lease electronic communications facilities under Section 43(1) of the ECA does not extend to the mobile spectrum.
- 2.1.9 MTN is of the opinion that using the Facilities Leasing Regulation to attempt to regulate wireless or mobile networks is incorrect. The Facilities Leasing Regulation has been developed to entertain wholesale access requests to facilities such as masts, space in switches etc, and not access to entire networks.
- 2.1.10 MTN notes that the definition of an “electronic communications facility” as contained within the ECA does not include access to mobile spectrum which would be required if one considered access to the mobile local loop (“MLL”) as a facility. MTN is of the opinion that radio frequency spectrum should not be regarded as a facility.
- 2.1.11 Access to the mobile and the Fixed Local loop (“FLL”) differs in that access to the MLL will also require the facility seeker to request access to either transmission and/or the core network infrastructure. This is not the case with requests for access to the FLL. Hence, should the scope of the “local loop unbundling” (“LLU”) regulation be broadened to include access to the mobile facilities it would be tantamount to the imposition of the implementation of wireless or mobile roaming without having followed the required Chapter 10 process and would exceed the ambit of Chapter 8 of the ECA.

- 2.1.12 The EC Act does not define the term “local loop” to provide guidance for the purpose of the draft regulation. Previously, the Authority, in the LLU discussion document stated that “*the local loop is a physical circuit connecting the electronic communications network termination point at the subscribers premises to the main distribution frame or equivalent facility in an electronic communications network and or means the physical twisted metallic pair circuit connecting the electronic communications network point at the subscribers premises to a connection pint at the edge of the providers network or a specified intermediate network.*” [our emphasis suggesting a fixed local loop]
- 2.1.13 We have also looked at foreign jurisprudence for guidance insofar as such jurisprudence may be relevant. The term “local loop”, as used by the European Commission, in its definition in the EU’s *Unbundled Local Loop Regulation*, where it is defined as the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or the equivalent facility in the fixed public telephone network.
- 2.1.14 As a result we submit that the ECA therefore does not willingly lend itself to an interpretation that wireless or mobile is included in a local loop. Should the Authority then wish to broaden the scope to include wireless or mobile it would have, in our submission, have no choice but to conduct an enquiry in terms of Chapter 10. It does not follow that a “wireless local loop” or a “mobile local loop” will by definition fall within the context and scope of Section 43 of the ECA.
- 2.1.15 MTN submits that for the reason enunciated above wireless local loop unbundling or mobile local loop unbundling is not envisaged in the ECA. As a result any attempt to broaden the scope of the draft regulation include mobile would fall outside the parameters of what the ECA contemplates.

An essential facility?

- 2.1.16 Under Section 43(8) of the ECA, ICASA is obliged to prescribe a list of essential facilities. ICASA has not done so at all.

If ICASA would propose to include radio frequency spectrum in a list of essential facilities, in our view, the inclusion of mobile spectrum in the list of essential facilities is probably prohibited by the provisions of Section 31 of the ECA.

2.1.17 Section 31 of the ECA provides that, subject to certain exemptions which do not apply to this case, no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence issued by ICASA. In other words, because of the technical nature of access frequency, no two persons may be issued a radio frequency spectrum licence for the same access frequency.

2.1.18 In our view, therefore, given the technical limitations of radio frequency spectrum, it would not be competent for ICASA to list radio spectrum as an essential facility under Section 43(8) of the ECA because the effect of listing something as an essential facility under Section 43(8) of the ECA is that ECNS licensees have an obligation to lease those facilities, and the leasing of the particular radio spectrum required for mobile loop unbundling is prohibited by Section 31 of the ECA.

2.2 SMP Analysis

2.2.1 Should ICASA wish to include mobile or wireless into the scope of local loop unbundling, ICASA must undertake the relevant market review prior to the imposition of LLU pro-competitive regulations being imposed in the South African market. That is, ICASA should define the relevant market(s), assess competition in the relevant market(s), identify competitive constraints and whether any licensees have SMP and where SMP is identified, then impose pro-competitive remedies, or SMP Obligations, in relation to the identified LLU market(s).

We submit that for the above reasons and the technical issues that will be discussed below mobile local loop is a misnomer and would not be able to be addressed in terms of Chapter 8 of the ECA.

Legal Conclusion

2.3 In the light of what is set out above, our submission is that:

- a) Mobile spectrum is not an electronic communications facility as this is defined in the ECA and therefore the obligation to lease electronic communications facilities does not extend to mobile spectrum.
- b) Given the technical characteristics of access frequency and the prohibition on the transmission and receipt of radio signal in Section 31 of the ECA, it is not possible lawfully to lease radio spectrum on the access frequency under the ECA. As a result, it would not be competent for ICASA to include mobile spectrum in the list of essential facilities under Section 43(8) of the ECA.
- c) A market analysis in terms of Chapter 10 of the ECA needs to be undertaken to ensure that only operators with SMP in the relevant market are obliged to adhere to the provisions in the draft Regulation.

ICASA is therefore not empowered to include mobile or wireless loop unbundling in the current Bitstream Access draft regulation.

MTN also incorporates the economic arguments it had made in Section 3 of its submission to ICASA dated 14 September 2011 and those arguments should be read as if incorporated herein with the necessary changes as required by the context.

3. SPECIFIC COMMENTS

3.1 Part 1: Definitions – “Aggregation Point” and “Local Loop”

- a) The draft Regulation includes the following definitions for “Aggregation Point” and “Local Loop”:

"Aggregation Point" means the main distribution frame, whether optical or electrical, or the radio network interface that connects the local loop with facilities of an ECNS licensee so as to provide voice and data services".

and,

“Local Loop” means all physical media, including electrical, optical and radio frequency used as the electronic communications facilities for the connection of an end-user or end-site to an access network aggregation point on the electronic communications network.”

- b) MTN is concerned that the reference to the words “radio network interface” and “radio frequency” (underlined above) would include access to the MTN mobile network which does not fall within the scope of the proposed Regulation which deals with Bitstream and shared/full local loop. This view is supported by the ICASA Findings Note (on ICASA’s Framework for introducing Local Loop Unbundling) published in Government Gazette 34823 on 6 December 2011 wherein ICASA clearly stated the following as regards the scope of the unbundling process:

“The Authority determines the following:

- ...
- *Due to the limited scope of this initial inquiry, the Authority will confine its findings to the application of Local Loop Unbundling to fixed line networks.*
-
- *The Authority will undertake an inquiry into the unbundling of wireless access networks.”*

- c) On the question of the favoured form of unbundling to be undertaken, ICASA made the following determination:

*“**Determination:** The Authority determines that for the scope of this inquiry, access to the “local loop” refers to the traditional fixed network, and not access to the mobile or fixed wireless network. The Authority will address access to wireless networks in an inquiry and a determination will then be made as to whether to conduct a Market Review into wireless access networks. The Authority accepts that Bitstream is a service and not an electronic communications facility and will not be regulated in terms of Chapter 8 of the ECA.”*

It is common cause that ICASA has not done any other form of inquiry onto whether or not mobile is or is not part of the local loop. MTN therefore submits that ICASA amend the draft Regulation to ensure that the definition of “local loop” is in line with

the previous ICASA findings which would also be consistent with international best practice.

3.2 Part 1: Definitions – Definition of “local loop”

- a) ICASA has previously identified, in the abovementioned “Findings Note”, the provision of unbundled wire line local loops as the relevant product market for LLU regulation in South Africa. Hence, it is important that ICASA specify the local loop that is being targeted in the Regulation. MTN believes that the national market for consideration in the Regulation should align with the previous ICASA Findings Note and should be restricted to:
- unbundled access to the copper local network.
 - bit-stream access/xDSL services.
- b) It is interesting that ICASA does not mention the Telkom copper local-loop specifically, but extended the obligation to lease Bitstream and Shared/Full local loop facilities to all ECNS licensees that operate a “local loop”.
- c) A review of foreign literature on this topic illustrates that “local loop”, as used by the European Commission, finds its definition in the EU’s Unbundled Local Loop Regulation, where it is defined as the *physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or the equivalent facility in the fixed public telephone network*.
- d) The European Commission’s Unbundled Local Loop Regulation required that, as of 31 December 2000, operators designated as having Significant Market Power (“SMP”) must meet all reasonable requests for unbundled access to their local loops and related facilities under transparent, fair and non-discriminatory conditions, and must charge prices for unbundled access to the local loop and related facilities on the basis of the principle of cost orientation.

MTN notes that the concept of SMP has not been included. A study of SMP in certain local loop markets would have assisted in identifying the role players who should be subject to the obligations in this Regulation.

- e) The obligation on all ECNS licensees to lease Local loop/Bitstream facilities cannot be viewed in the same light as LLU of the copper local-loop owned by Telkom as in most cases:
1. The ECNS licensee's fibre or wireless local networks are privately funded as apposed the Government funded copper local loop. The roll-out of the latest fibre and wireless technologies are in the early stages of implementation and should not be considered in the same light as access to the traditional fixed line copper network which has existed for decades.
 2. For wireless Local-loops that require radio spectrum, one must consider that this spectrum is a limited resource and allocations thereof are subject to extensive regulations which include frequency licence fees.
- f) The concept of "mobile local loop" is a misleading notion as technical constraints do not allow break-out or routing on a local level. The mobile radio network cannot route locally at the base transceiver station ("BTS") as routing takes place at the mobile switching station ("MSC") level. Therefore, broadening the scope to include radio spectrum in the definition of local loop and by implication to "mobile roaming" would be an impermissible inclusion. Mobile roaming cannot be likened to facilities leasing as it entails access to an entire national mobile radio network and associated services. In addition is entails granting access to radio frequency spectrum, the mobile network's entire system of electronic communications facilities and its switching, billing and other associated services which amounts to considerable more than "facilities leasing" as envisaged in Section 43 of the ECA.

3.3 **Part 2: Section 3 - Facilities to be leased in the provision of access to the Local Loop**

- a) The intention of this Regulation seems to exceed the scope of traditional LLU and seems to oblige all ECNS licensees including emerging ECNS licensees to incur additional investment which should only be an obligation to licensees operating wire line (copper) infrastructure ie.

Part II, Section 3(b):

“Shared/Full Loop Access: An ECNS licensee must provide the following facilities to a facilities seeker:

- i. Point of interconnection at a Hand-Over Distribution Frame adjacent to any Main Distribution Frame (or equivalent) designated by the Authority;*
- ii. Relevant co-location space; and*
- iii. Associated support systems to ensure effective functioning of a point of connection.”*

The Regulation places an extensive financial burden on all ECNS licensees to build capital intensive infrastructure eg handover facilities, floor space, air-conditioning, power, additional ducting, etc). These costs, if the implementation is technically and financially feasible, should be shared by the Facilities Seeker.

- b) The fact that these obligations are placed on all ECNS licensees and not only licensees offering wire line copper facilities would discourage new ECNS licensees from building extensive local loop networks using fibre and wireless technologies.

Interconnection Service?

- c) The extract in a) above mentions the words “point of interconnection” which is a concept encompassed in Section 37 the ECA relating to the obligation to provide interconnection services. In this regard, MTN questions on what basis ICASA

considers the leasing of facilities and access to the local loop as an interconnection service for which an ECNS licensee is obliged to provide?

In this regard, any obligation to provide interconnection services would include:

- 1) The signing of an interconnection agreement.
- 2) The establishment of points of interconnection, which are established at mobile switching centres where SS7 and IP voice equipment such as media gateways and session border controllers, are located.
- 3) The payment of interconnection termination rates are payable to each party.

MTN questions how access to an electronic communications facility and or the local loop can be considered as an interconnection service where the parties leasing the facilities would be obliged to comply with the points above. MTN proposes that all reference to “interconnection” and “points of interconnection” be clarified in a definition or removed from the Regulation.

Technical and Financial feasibility

- d) Furthermore, the Regulation obliges the Facilities provider to provide access to support systems but in so doing removes flexibility in terms of, for example, billing systems that the Facilities Seeker may wish to utilise. Although this places an additional burden on the Facilities Provider, it could be used as an instrument to make local loop access financially unviable for the Facilities Seeker seekers. In this regard, Part III, Section 7 states:

“Non-discriminatory access to the local loop

a) Pricing

- i. An ECNS licensee may only apply a fee to the facilities seeker similar to that charged to itself or entities under its control;*
- ii. The ECNS licensee requesting access to the local loop is obliged to pay for any once-off capital equipment required to facilitate the provision of the requested services; and*
- iii. The ECNS licensee requesting access to the local loop is obliged to pay for any billing system-related costs required to facilitate the provision*

of services.”

A Facilities Provider could levy an unacceptably high fee for the capital investment incurred and access to their billing systems which would prevent effective competition which is object of the Regulation. In this regard, there is no guidance as to the methodology for calculating the fees in question.

- e) Regulation 5 and 6 do not provide any detail as to the criteria which a Facilities Provider can take into account when considering requests from Facilities Seekers. The mere mention in Regulation 5 that “*a request if financially feasible where an I-ECNS licensee provides the same or similar service to itself or entities under its control*” (and similarly in Regulation 6 with respect technical feasibility) cannot then preclude the ECNS licensee providing access to the facility from considering other technical and financial criteria which are directly relevant to the requesting party’s request. These criteria may include a consideration of differences in technical standards and poor credit ratings or other financial irregularities associated with the facilities seeker. This flexibility to include other technical and financial criteria is particularly important as neither the ECA nor this draft Regulation provide clear guidance as to the ambit of issues that may be considered by the Facilities Provider when considering requests.
- f) In any event, ICASA seems to want to confine the technical or financial feasibility to only one criterion, without any explanation as to how ICASA arrived at that conclusion. What is more problematic is that all ECNS licensees will by necessity provide a service to itself because that is the reason why such licensee invests in its own network. ICASA’s reference then that it is financially feasible if a licensee provides a service to itself is an illogical criterion and does not take the matter any further. ICASA is urged to rethink these criteria.
- g) It is noted that the Facilities Provider is obliged to permit access to “co-location space” that is required by the Facilities Seeker. In this regard, are ECNS Licensees entitled to reject local loop access where there is no physical floor space to accommodate the Facility Seeker’s equipment? Once again the draft Regulation should provide clear criteria that could be used by the Facilities Provider when

making decisions as to the financial and technical feasibility of any access request from the Facilities Seeker.

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